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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION
18

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20 BORZYMOWSKI, BROOKE CORBETT,
TAYLOR BROWN, JUSTIN BAUER,
21 HEIRLOOM ESTATE SERVICES, INC.,
KATHLEEN BAKER, MATT
22 MUILENBURG, WILLIAM BON, and
JASON PETTY, on behalf of themselves and
23 all others similarly situated,

24 Plaintiffs,

25 v.

26 APPLE INC.,

27 Defendant.
28

Case No. 5:16-cv-04942-LHK

**DEFENDANT APPLE INC.'S NOTICE OF
MOTION AND MOTION TO DENY
CLASS CERTIFICATION**

Date: November 14, 2019
Time: 1:30 p.m.
Dept.: Courtroom 8 – 4th Floor
Judge: Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 14, 2019, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, Courtroom 8, before the Honorable Lucy H. Koh, Defendant Apple Inc. ("Apple") will and hereby does move for an order denying class certification for the remaining putative subclasses (the "Parked Claims Subclasses"). This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Tiffany Cheung in support thereof, all other pleadings and papers on file herewith, and such other argument and evidence as may be presented to the Court before this matter is taken under submission.

RELIEF REQUESTED

Apple seeks an order denying class certification for all putative subclasses arising out of or relating to the following causes of action: Claim 1 (California Consumer Legal Remedies Act); Claim 2 (California Unfair Competition Laws); Claim 3 (California False Advertising Law); Claim 8 (Connecticut Unfair Trade Practices Act); Claim 11 (Michigan Consumer Protection Act); Claim 12 (New York General Business Law § 349); Claim 13 (New York General Business Law § 350); Claim 16 (Negligent Misrepresentation under New York law); Claim 17 (Unjust Enrichment under New York law); and Claim 22 (Utah Consumer Sales Practices Act).

Dated: August 21, 2019

Respectfully submitted,

MORRISON & FOERSTER LLP

By: /s/ Arturo González
 Arturo J. González

Attorneys for Defendant
 APPLE INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

No matter the underlying causes of action before the Court—whether they are the prior Selected Claims or the Parked Claims—class certification requires that Plaintiffs satisfy the requirements of Rule 23 and *Comcast*. Because the Court has already decided that issue against Plaintiffs, class certification of the Parked Claims should be denied. The Court has denied certification on Plaintiffs’ damages theory three times, and twice rejected Plaintiffs’ belated attempts to correct errors identified by Apple in their expert’s second damages survey (“Boedeker 2”) by submitting a putative third survey (“Boedeker 3”). By representing to the Court that they intend to rely solely on Boedeker 3 to satisfy the requirements of *Comcast* for the Parked Claims, Plaintiffs concede that they seek to relitigate the Court’s prior class certification, prejudice, and untimeliness findings, using the Parked Claims as a pretext for a do-over that the Court has already denied. Settled principles of issue preclusion, law of the case, and comity warrant denial of another round of duplicative, wasteful, and prejudicial litigation. Class certification of the Parked Claims should therefore be denied on preclusion grounds.

II. STATEMENT OF ISSUES

Whether class certification of the Parked Claims should be denied because principles of issue preclusion, law of the case, or comity preclude the Parked Claims Plaintiffs from relitigating the Court’s prior orders denying class certification under *Comcast* and striking Boedeker’s putative third survey as severely prejudicial and untimely.

III. BACKGROUND

A. The Parked Claims Structure

The Court directed the parties at the November 30, 2016 Initial Case Management Conference to each select five causes of action to litigate in a motion to dismiss—creating the present Parked Claims structure. (ECF No. 41 at 1 (“The parties shall litigate a total of ten causes of action in the motion to dismiss.”).) To the extent any claims survived, the Court was “inclined to have those surviving claims litigated through summary judgment.” (*Id.* at 2.)

In response to Apple’s objections at the Initial Case Management Conference that the

1 Parked Claims structure may result in duplicative and burdensome discovery (among other
 2 reasons), the Court clarified that the Parked Claims would not be stayed as the litigation
 3 progressed. (ECF No. 47 at 32:11-14, 40:1-4.) The Court added that, if the parties reached the
 4 Parked Claims, “there will be so much law of the case developed at that point” that “it’ll be much
 5 more efficient.” (*Id.* at 44:2-3.)

6 The next month, at the Court’s direction, the parties filed a joint list of ten causes of action
 7 to litigate on a motion to dismiss. (ECF No. 44.) At the next Case Management Conference on
 8 January 12, 2017, the parties confirmed their agreement that discovery would proceed on all 22
 9 claims—not just the Selected Claims.¹ (ECF No. 69 at 27:13-28:18.) The Court memorialized
 10 this agreement in its Case Management Order, stating “[w]hen the discovery stay is lifted, there
 11 will be no bifurcation of discovery.” (ECF No. 57 at 1.) The Court then set a case management
 12 schedule that included deadlines for both fact and expert discovery. (*Id.* at 2.)

13 The Court appointed McCune Wright Arevalo, LLP (“McCune Wright LLP”) as interim
 14 lead class counsel on December 23, 2016, to represent the interests of the class members “in
 15 which overlapping, duplicative, or competing class suits are pending before a court.” (ECF
 16 No. 48 at 2:3-7.) McCune Wright LLP has since litigated every aspect of this litigation, through
 17 four complaints (ECF Nos. 1, 43, 86, 172), two motions to dismiss (ECF Nos. 54, 87),
 18 voluminous fact and expert discovery (*e.g.*, ECF Nos. 129, 151-4, 179, 272, 273, 352), a motion
 19 for summary judgment (ECF No. 291), and three motions for class certification (ECF Nos. 174,
 20 270, 341).

21
 22 ¹ “THE COURT: All right. Now, let’s talk about the discovery, are we anticipating that if
 23 and when the discovery stay is lifted, is that on all 22 claims, or is it only on this narrow set of ten
 24 claims?”

25 MR. SINGH: So we don’t want to have to go through the process multiple times should
 26 there be a later revisiting of what we call the park[ed] claims at a later point in the case.

27 THE COURT: So you want it to be everything?

28 MR. SINGH: I think everything. . . .

MR. WRIGHT: I agree that we don’t want to bifurcate the discovery so we’re in
 agreement with that.” (ECF No. 69 at 27:13-28:11.)

1 Consistent with the Court’s non-bifurcation order, the parties engaged in fact and expert
 2 discovery simultaneously on *all* 22 claims. Apple took the depositions of all named Plaintiffs in
 3 the action, including the Parked Claims Plaintiffs. (See Declaration of Tiffany Cheung in Support
 4 of Apple’s Motion to Deny Class Certification (“Cheung Decl.”) ¶¶ 2-9, Exs. A-G.)² All Parked
 5 Claims Plaintiffs testified to their ongoing involvement and participation in the litigation. (*Id.*)

6 While Plaintiffs submitted separate declarations from their experts in support of class
 7 certification motions on the Selected Claims, respectively (ECF Nos. 174-6, 174-38, 174-46, 199-
 8 9, 199-10, 270-1, 341-3, 366-1), Plaintiffs also submitted expert reports for all claims on the
 9 expert discovery timetable set by the Court. Those expert reports encompassed all named
 10 Plaintiffs, including the Parked Claims Plaintiffs. Plaintiffs’ technical expert reports from
 11 Charles M. Curley were not limited to the Selected Claims Plaintiffs and provided opinions about
 12 both the iPhone 6 and 6 Plus (even though the Selected Claims Plaintiffs owned only iPhone 6
 13 Plus devices). Curley’s report also analyzed the touchscreens of all named Plaintiffs (ECF
 14 No. 378-11 at 60-61) and provided opinions about the alleged cause of all of their touchscreen
 15 issues (*id.* ¶¶ 181-83).

16 Likewise, Plaintiffs’ damages survey and damages expert report from Stephan Boedeker
 17 was not limited to the Selected Claims Plaintiffs. Boedeker’s survey included participants from
 18 all states—not just the Selected States. (ECF No. 341-3 at 14.) The iPhone test attributes
 19 included in his survey were based on the allegations of all named Plaintiffs, including the
 20 inoperability percentages alleged by Parked Claims Plaintiffs Pajaro, Baker, Corbett, and Maxim.
 21 (*Id.* ¶ 22 n.2.) Like Curley’s expert report, Boedeker’s survey addressed both iPhone 6 and
 22 iPhone 6 Plus purchasers. In addition, the damages model he proposed purportedly could “be
 23 used to expand the results of the conjoint study to a complete model to calculate class-wide
 24 damages.” (*Id.* ¶ 83.)

27 ² All cited exhibits (“Ex.”), unless otherwise noted, are attached to the accompanying
 28 Declaration of Tiffany Cheung in Support of Apple’s Motion to Deny Class Certification.

B. Class Certification Denial and Plaintiffs' Seriatim Damages Surveys

As the Court recounted in detail in its June 20, 2019 Order, Plaintiffs have already filed three motions for class certification in this case, and Boedeker has submitted three declarations and numerous other supporting materials that have all failed to provide a damages model satisfying *Comcast's* requirements. (ECF No. 392.) In the first motion for class certification, Plaintiffs failed to provide a *Comcast*-compliant damages model because Boedeker's conjoint analysis ("Boedeker 1") did not match plaintiffs' damages theory. (See ECF No. 226.) Following denial of their first class certification motion, Plaintiffs filed a Rule 23(f) petition in the Ninth Circuit (ECF No. 235-1), which they withdrew after completion of briefing and before the Ninth Circuit had ruled on the petition. (ECF No. 251.) Meanwhile, the Court had stayed all discovery pending resolution of Plaintiffs' Rule 23(f) petition. (ECF No. 236.)

Six months after the Court's denial of class certification (ECF No. 268), rather than address the issues with Boedeker's survey identified by Apple and the Court, Plaintiffs filed a second motion for class certification based on a hypothetical survey. (ECF No. 270.) The Court denied the motion without prejudice "[b]ecause analysis of whether Boedeker's new survey satisfies *Comcast* is essential to a class certification determination; because Plaintiffs did not complete this survey before filing their renewed motion for class certification despite having 6 months to do so; and because briefing on class certification should address Boedeker's new survey." (ECF No. 314 at 3.)

On their third attempt to certify a class and comply with *Comcast*, Plaintiffs submitted a second Boedeker survey—the same one submitted on the deadline for opening expert reports—that they later admitted had various errors. (ECF Nos. 335 at 2, 341-3.) Plaintiffs requested leave to redo their second survey and submit a putative third survey. (ECF No. 335.) The Court denied the motion "[b]ecause Plaintiffs had notice of Boedeker's transposition error almost a month in advance of their administrative motion; because Plaintiffs' motion comes *after* Apple already served its rebuttal expert reports in response to Boedeker's January 18, 2019 expert report and new survey; because Apple has already had to fully brief class certification twice and is required to do so a third time; and because this would be the *fourth* time Apple would need to rebut

Boedeker's survey or a hypothetical survey." (ECF No. 342 at 5.)

In violation of the Court's Order, Plaintiffs served Apple with a "corrected" report and survey ("Boedeker 3") on March 25, 2019. (ECF No. 357.) The Court granted Apple's motion to enforce the prior order, reiterating that it had "explicitly prohibited" Plaintiffs from redoing the second survey. (ECF No. 359 at 2.) The Court further found that allowing Plaintiffs to rely on a third survey "would result in severe prejudice to Apple," and would also be "untimely" because "Plaintiffs' last-minute change to their expert report also comes after the February 15, 2019 deadline for the exchange of expert reports." (*Id.*)

On June 20, 2019, the Court denied Plaintiffs' motion for class certification for the third time, holding:

Plaintiffs have repeatedly failed to produce a damages model that satisfies *Comcast*, despite three motions for class certification, two completed Boedeker surveys, and one hypothetical Boedeker survey, and despite the benefit of the many filings identifying flaws in Plaintiffs' damages models, including the Court's May 8, 2018 order, Apple's three oppositions to class certification, and Apple's rebuttals to two completed Boedeker surveys and one hypothetical Boedeker survey. ***Allowing Plaintiffs a fourth attempt to produce a Comcast-compliant damages model would be severely prejudicial to Apple. Comcast does not require the Court or Apple to engage in an endless cycle of flawed attempts to produce a satisfactory damages model.*** Thus, because Plaintiffs have failed to present a damages model that measures "only those damages attributable" to Plaintiffs' theory of liability, *Comcast*, 569 U.S. at 35, class certification is not warranted.

(ECF No. 392 at 29-30 (emphasis added).)

Plaintiffs did not file a Rule 23(f) petition challenging the Court's June 20, 2019 denial of class certification. The parties subsequently participated in a settlement conference with Magistrate Judge Corley, which resulted in "a binding settlement" between Apple and the surviving Selected Claims Plaintiffs. (ECF Nos. 396, 402 at 1.)

C. Plaintiffs' Renewed Request for a Fourth Attempt to Produce a Comcast-Complaint Damages Model

The parties appeared before the Court on July 24, 2019, at a Case Management Conference to discuss how to proceed with the Parked Claims. Plaintiffs proposed starting this litigation—filed almost three years ago—from the very beginning with the Parked Claims, and

1 proposed setting deadlines for Apple’s motion to dismiss. (ECF No. 402 at 3.) Plaintiffs also
 2 renewed their request to relitigate the *Comcast* issue a fourth time, despite the Court’s prior
 3 *Comcast* rulings. Plaintiffs did not argue that any state-law differences relating to the Parked
 4 Claims required a new damages report or dictated a different result under *Comcast*. To the
 5 contrary, Plaintiffs represented to the Court that Plaintiffs would rely solely on Boedeker 3—the
 6 same survey they sought to proffer for the Selected Claims—as the basis for satisfying *Comcast*
 7 on any motion to certify a class on the Parked Claims:

8 Your Honor, just for clarity, so as not to run afoul again, the third
 9 survey is the survey that we were going to proceed on. . . . [T]he
 10 Parked Claims are entitled to have us move forward on that third
 11 survey.

12 (Ex. H at 26:21-23, 27:5-6.) At Apple’s request, the Court invited briefing on whether the Parked
 13 Claims structure requires re-litigation of the Court’s orders denying class certification under
 14 *Comcast* and striking Boedeker 3 as severely prejudicial and untimely.³ (*Id.* at 48:23-25.)

14 **IV. LEGAL STANDARD**

15 The United States Supreme Court has held that a plaintiff in a class action bears the
 16 burden of presenting a damages model demonstrating that “damages are susceptible of
 17 measurement across the entire class for purposes of Rule 23(b)(3).” *Comcast v. Behrend*, 569
 18 U.S. 27, 35 (2013). The damages model “must measure only those damages attributable to” the
 19 plaintiff’s theory of liability. *Id.* The Supreme Court specifically rejected the notion that “any
 20 method of measurement is acceptable so long as it can be applied classwide, no matter how
 21 arbitrary the measurements may be.” *Id.* at 35-36. Instead, plaintiffs must come forward with a
 22 workable damages model. *In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. 36, 78
 23 (D.N.H. 2015) (rejecting conjoint damages analysis where plaintiff’s “efforts to identify a
 24 workable model fall short”). While the precise framing of survey questions is generally an issue

25 _____
 26 ³ The present motion is limited to the issue of whether Plaintiffs are precluded from
 27 seeking class certification over the Parked Claims in light of the Court’s prior rulings in this case
 28 regarding *Comcast* and the exclusion of Boedeker 3 as unduly prejudicial and untimely. To the
 extent any future motion for class certification is brought, Apple reserves the right to oppose that
 motion on all other bases not addressed in the present motion.

1 of weight, rather than admissibility, this Court has recognized that “that there must be outer limits
 2 to this principle. At some point . . . the description of [an] attribute in a survey may vary so much
 3 from the allegations or evidence that the survey becomes untethered from the facts of the case
 4 ‘and, ergo, non-helpful.’” *In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 372 (N.D.
 5 Cal. 2018) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993)).

6 V. ARGUMENT

7 Plaintiffs have had a full and fair opportunity to put forward a *Comcast*-compliant
 8 damages model. The Court’s determination that Boedeker 2—Plaintiffs’ final damages survey
 9 before the expert discovery cutoff—overstated damages in violation of *Comcast*, turned on a
 10 Rule 23 requirement that applies to all the Selected and Parked Claims equally, and binds all
 11 Plaintiffs in this lawsuit. Plaintiffs’ representation that, if given a fourth run at *Comcast*, they
 12 would rely on Boedeker 3—which the Court previously struck as “severely prejudicial” to Apple
 13 and “also untimely”—makes clear that Plaintiffs are trying to re-plow old ground and improperly
 14 take advantage of the Parked Claims structure to relitigate settled issues decided adversely to
 15 them. Those attempts are barred by the doctrines of issue preclusion, law of the case, and comity.

16 A. Issue Preclusion Bars Class Certification of the Parked Claims

17 Issue preclusion applies across all claims in this litigation, regardless of the Parked Claims
 18 structure, because it “bars ‘successive litigation of an issue of fact or law actually litigated and
 19 resolved in a valid court determination essential to the prior judgment,’ *even if the issue recurs in*
 20 *the context of a different claim.*” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added)
 21 (citation omitted).⁴ As the Supreme Court has recognized, issue preclusion is “central to the

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 23
 24 ⁴ “A ‘final judgment’ for purposes of collateral estoppel can be any prior adjudication of
 25 an issue in another action that is determined to be ‘sufficiently firm’ to be accorded conclusive
 26 effect.” *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983). A denial of
 27 class certification is sufficiently “firm” to preclude re-litigation where a party has been given a
 28 full and fair opportunity to litigate the issue. *See, e.g., Murray v. Sears, Roebuck & Co.*, No. 09-
 05744 CW, 2010 U.S. Dist. LEXIS 83284, at *13 (N.D. Cal. July 21, 2010) (order denying class
 certification was “sufficiently firm” where plaintiffs “extensively litigated” the issue and the court
 gave it “thorough consideration”). Here, the Court’s class certification denial is “sufficiently
 firm” to preclude re-litigation because Plaintiffs failed to produce a *Comcast*-compliant damages
 model even after “three motions for class certification, two completed damages surveys, and one

1 purpose for which civil courts have been established, the conclusive resolution of disputes within
 2 their jurisdictions.” *Montana v. United States*, 440 U.S. 147, 153 (1979). “To preclude parties
 3 from contesting matters that they have had ***a full and fair opportunity to litigate*** protects their
 4 adversaries from the expense and vexation attending multiple lawsuits, conserves judicial
 5 resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent
 6 decisions.” *Id.* at 153-54 (emphasis added).

7 Issue preclusion applies here because (1) the Parked Claims Plaintiffs are seeking to
 8 relitigate issues decided in earlier proceedings over which they “had a sufficient ‘laboring oar,’”
 9 (2) the issues presented “are in substance the same as those resolved,” and (3) no “controlling
 10 facts or legal principles have changed” or “other special circumstances” exist that would warrant
 11 “an exception to the normal rules of preclusion.” *Id.* at 154-55; *see also Smyth v. China Agritech,*
 12 *Inc.*, No. CV 13-03008-RGK (PJWx), 2013 U.S. Dist. LEXIS 195196, at *12-13 (C.D. Cal.
 13 Sept. 26, 2013).

14 **1. The Parked Claims Plaintiffs Exerted Control Over This** 15 **Litigation**

16 Even assuming that the Parked Claims Plaintiffs were “nonparties” to this action or to the
 17 prior class certification motions (and thus to whom issue preclusion would not normally apply),
 18 they fall into a long-recognized exception against nonparty preclusion because they “assume[d]
 19 control over litigation in which they [had] a direct financial or proprietary interest” and now “seek
 20 to redetermine issues previously resolved.” *Montana*, 440 U.S. at 154.

21 In *Montana*, the Supreme Court determined that the United States, while not a party to a
 22 prior state litigation, had “a sufficient ‘laboring oar’ in the conduct of the state-court litigation to
 23 actuate principles of estoppel” because it had directed the lawsuit to be filed, reviewed and
 24 approved the complaint, paid attorneys’ fees and costs, and directed the filing and withdrawal of
 25 an appeal. *Id.* at 154-55. Similarly, in *Smyth*, 2013 U.S. Dist. LEXIS 195196, at *12-13, the

26
 27

hypothetical survey,” as well as “with the benefit of a Court order and Apple’s many briefs and
 28 expert reports identifying flaws in Plaintiffs’ damages model.” (ECF No. 392 at 27-28.)

1 court denied class certification after finding a plaintiff had likely “exercised control over” an
 2 earlier, unsuccessful class action by reviewing the complaint, signing an unfiled certification that
 3 they were willing to serve as lead plaintiffs, and retained the same expert witness as the named
 4 plaintiff in the earlier class action. Recognizing that the plaintiff in the case could “be subject to a
 5 unique preclusion defense,” the court held that the plaintiff did not meet the typicality
 6 prerequisites of Rule 23(a). *See id.* at *11-13.

7 Here, the Parked Claims Plaintiffs have had “a sufficient ‘laboring oar’” in the
 8 proceedings to apply issue preclusion. *Montana*, 440 U.S. at 155. First, all of them are named
 9 plaintiffs in this lawsuit. (ECF No. 172.) They all reviewed and approved the complaint. (*See*
 10 Ex. A at 234:18-22, 240:5-9 (describing role in reviewing and approving complaints); Ex. B at
 11 219:4-6, 227:7-10, 231:1-3, 238:6-8 (same); Ex. C at 222:6-8, 224:10-12, 226:2-5 (same); Ex. D
 12 at 214:16-25, 218:18-21 (same); Ex. E at 234:23-25, 241:23-25, 246:3-5 (same); Ex. F at 204:22-
 13 24, 207:13-15 (same); Ex. G at 172:2-5, 178:17-24, 181:11-14, 185:13-15 (same).) Some Parked
 14 Claims Plaintiffs worked with their legal counsel to correct errors in the complaints to adequately
 15 represent their positions in this litigation. (Ex. A at 237:4-8 (describing his suggestion to correct
 16 an error in the complaint); Ex. B at 220:5-24 (same).)

17 Second, they are all represented by the same interim lead class counsel—McCune Wright
 18 LLP—as the Selected Claims Plaintiffs. (ECF No. 48; Ex. A at 23:24-24:3 (confirming McCune
 19 Wright LLP as his counsel); Ex. B at 38:23-24 (same); Ex. C at 20:4-6 (same); Ex. D at 26:25-
 20 27:3 (same); Ex. E at 27:19-22 (same); Ex. F at 16:19-21 (same); Ex. G at 176:18-19 (same).)
 21 They are, therefore, all pursuing the same overall litigation strategy and legal theory. All the
 22 Parked Claims Plaintiffs referred to or described contingency fee agreements with McCune
 23 Wright LLP relating to the payment of attorneys’ fees and costs. (Ex. A at 18:21-24 (describing
 24 contingency fee arrangement); Ex. B at 40:9-11 (same); Ex. C at 30:21-31:1 (same); Ex. D at
 25 26:16-24 (same); Ex. E at 30:14-20 (same); Ex. F at 18:22-19:1 (same); Ex. G at 25:22-26:4
 26 (same).)

27 Third—and importantly—because the Court did not bifurcate discovery, all the Parked
 28 Claims Plaintiffs participated in fact and expert discovery, just as the Selected Claims Plaintiffs

1 did. The Parked Claims Plaintiffs produced documents, responded to written discovery, and sat
 2 for depositions before the fact discovery cutoff. (Cheung Decl. ¶ 2.) They also retained the same
 3 expert witnesses and submitted expert reports on the same deadlines as the Selected Claims
 4 Plaintiffs. Their reports included technical expert reports providing opinions about the nature of
 5 the alleged defect in the Parked Claims Plaintiffs' phone models, as well as their individual
 6 phones. (ECF No. 378-11 at 60-61.) They also supported a damages survey (Boedeker 2) that
 7 relied on the Parked Claims Plaintiffs' alleged inoperability percentages and purported to
 8 "calculate class-wide damages" that could be applied to any cause of action regardless of the
 9 proposed state subclass. (ECF No. 341-3 ¶¶ 22 n.2, 83.)

10 Finally, as discussed in the next section, the Parked Claims Plaintiffs are now asking the
 11 Court to reconsider the exact same issues decided earlier in the litigation. Because the Parked
 12 Claims Plaintiffs have exerted control over the litigation and would be relying on the same expert
 13 and damages model proffered with respect to the Selected Claims, issue preclusion applies and is
 14 dispositive of any class certification motion on the Parked Claims.

15 **2. The Parked Claims Plaintiffs Seek to Relitigate the Same Issues** 16 **That Were Previously Resolved by the Court**

17 The issues that the Parked Claims Plaintiffs seek to reopen—whether they meet the
 18 requirements of *Comcast* under Rule 23—"are in substance the same as those resolved" by the
 19 Selected Claims Plaintiffs. *Montana*, 440 U.S. at 155. The Court need look no further than the
 20 Parked Claims Plaintiffs' representation that, if given a fourth chance to certify a class, they
 21 would rely on Boedeker 3—the same damages survey offered by the Selected Claims Plaintiffs—
 22 to determine that the two "issues" are the same.

23 The Ninth Circuit construes the "same issue" requirement broadly as precluding re-
 24 litigation of an issue based on arguments that were raised or could have been raised in the earlier
 25 action. "[O]nce an issue is raised and determined, *it is the entire issue that is precluded*, not just
 26 the particular arguments raised in support of it in the first case." *Kamilche Co. v. United States*,
 27 53 F.3d 1059, 1063 (9th Cir. 1995) (emphasis added) (citation omitted); *see also Smith v. Bayer*
 28 *Corp.*, 564 U.S. 299, 310 (2011) (recognizing that class certification decisions in state and federal

1 court would present the “same issue” if the state court “follow[s] the same approach as the federal
 2 court”); Restatement (Second) of Judgments § 27 cmt. 3c (Am. Law Inst. 1982) (“If the party
 3 against whom preclusion is sought did in fact litigate an issue . . . and suffered an adverse
 4 determination, . . . new arguments may not be presented to obtain a different determination of that
 5 issue.”).

6 Here, the Court decided the *Comcast* issue adversely to the Selected Claims Plaintiffs by
 7 ruling that Boedeker 2 did not meet the requirements of *Comcast* and precluding their reliance on
 8 Boedeker 3 as “severely prejudicial” to Apple and “also untimely.” The Parked Claims Plaintiffs
 9 make no argument that they require a different damages model to satisfy their burden under
 10 *Comcast* in any motion to certify the Parked Claims. Nor could they. *Comcast* is a requirement
 11 that cuts across all the Selected Claims and Parked Claims equally. Plaintiffs’ express
 12 representation that they intend to rely on Boedeker 3—which the Selected Claims Plaintiffs also
 13 sought to rely on to meet *Comcast*—only proves that the “issue” is the same.

14 Because the Court adversely determined the *Comcast* issue against the Selected Claims
 15 Plaintiffs, ***the entire issue is precluded*** as to the Parked Claims Plaintiffs. *Kamilche*, 53 F.3d at
 16 1063. Plaintiffs therefore cannot rely on Boedeker 3 to satisfy *Comcast* any more than the
 17 Selected Claims Plaintiffs could. Allowing parties (including nonparties who assume control of
 18 the litigation) to make new arguments in pursuit of a different outcome on the same issue would
 19 undermine the “central [] purpose for which civil courts have been established, the conclusive
 20 resolution of disputes within their jurisdictions.” *Montana*, 440 U.S. at 153-54.

21 Nor may the Parked Claims Plaintiffs relitigate the Court’s multiple orders precluding
 22 reliance on Boedeker 3. As the Court previously held, “Plaintiffs’ service of the putative Third
 23 Boedeker Report ‘flies in the face’ of the Court’s March 6, 2019 order, which ‘explicitly
 24 prohibited’ Plaintiffs from redoing the second survey and completing a third Boedeker report.”
 25 (ECF No. 392 at 16.) The Court also found that “allowing Plaintiffs to serve a third survey and
 26 third expert report would result in severe prejudice to Apple, which had already served two expert
 27 reports addressing Plaintiffs’ second survey.” (*Id.*) The Court further held that “Plaintiffs’ last-
 28 minute service of the putative Third Boedeker Report was untimely because Plaintiffs had missed

1 by more than a month the February 15, 2019 deadline for the exchange of expert reports.” (*Id.*)
 2 These issues, too, bind the Parked Claims Plaintiffs under issue preclusion principles. They
 3 participated in fact and expert discovery, and proffered Boedeker 2 on the expert report deadline
 4 to serve as a purported class-wide damages model for all causes of action. Plaintiffs should not
 5 be permitted to misuse the Parked Claims structure as a vehicle to avoid the Court’s orders
 6 expressly prohibiting a fourth re-do of Plaintiffs’ damages report and to escape the Court’s expert
 7 report deadlines, to Apple’s severe prejudice.

8 Because the Parked Claims Plaintiffs had a “full and fair opportunity” to litigate *Comcast*
 9 by joining this lawsuit as class representatives, approving the complaints, participating in fact and
 10 expert discovery, and submitting a damages survey attempting to comply with *Comcast*, issue
 11 preclusion bars the Parked Claims Plaintiffs from revisiting the Court’s prior, adverse ruling.

12 3. No Exception Applies

13 No “controlling facts or legal principles have changed” or “other special circumstances”
 14 exist that would warrant “an exception to the normal rules of preclusion.” *Montana*, 440 U.S. at
 15 155. To the contrary, Plaintiffs have expressly represented that they seek to relitigate *Comcast*
 16 using Boedeker 3—the same damages survey offered by the Selected Claims Plaintiffs that the
 17 Court twice struck. Plaintiffs therefore concede that no new facts or legal principles would
 18 require departing from the normal rules of preclusion here.⁵

19 B. The Court’s Prior *Comcast* Decision Applies to the Parked Claims 20 Plaintiffs as Law of the Case

21 The Court has already determined that Boedeker 2 does not satisfy *Comcast* and that
 22 Plaintiffs may not try again to correct the repeated errors in Boedeker’s model. (ECF No. 392 at
 23 29-30.) Those rulings apply equally to Plaintiffs as law of the case.

24 Courts have broad discretion to refuse to reconsider prior rulings under the law of the case
 25

26 ⁵ To the extent that Plaintiffs attempt to argue that the opinion in *Nguyen v. Nissan N. Am.,*
 27 *Inc.*, No. 18-16344, 2019 U.S. App. LEXIS 22296 (9th Cir. July 26, 2019) somehow supports
 28 their position, that case has no impact on the reasoning of the Court’s latest class certification
 denial evaluating a different damages model based on a conjoint survey.

1 doctrine. “Under the law of the case doctrine, ‘a court is generally precluded from reconsidering
 2 an issue previously decided by the same court, or a higher court in the identical case.’” *Ingle v.*
 3 *Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) (citation omitted). “This doctrine has developed
 4 to ‘maintain consistency and avoid reconsideration of matters once decided during the course of a
 5 single continuing lawsuit.’” *Id.* (citation omitted); *see also Hadley v. Kellogg Sales Co.*, No. 16-
 6 CV-04955-LHK, 2019 U.S. Dist. LEXIS 136791, at *44 (N.D. Cal. Aug. 13, 2019) (refusing to
 7 reconsider prior ruling under law of the case).

8 Like issue preclusion, the law of the case doctrine does not require “complete identity of
 9 the parties,” and may be applied to preclude *different plaintiffs* in the same action from
 10 relitigating a previously decided issue—just as the Parked Claims Plaintiffs seek to do here. *See*
 11 *Air Transp. Ass’n of Am. v. City & Cty. of S.F.*, No. C 97-01763 CW, 1999 U.S. Dist. LEXIS
 12 8747, at *16 n.3 (N.D. Cal. May 27, 1999) (citing *Disimone v. Browner*, 121 F.3d 1262, 1266
 13 (9th Cir. 1997)). In *Air Transportation*, Plaintiffs ATA and AIRCON filed a motion for summary
 14 judgment seeking a determination that federal law preempted a San Francisco Ordinance. *Id.* at
 15 *8. The Court ruled against ATA and AIRCON on two bases. *Id.* Two different plaintiffs—
 16 FedEx and United—later joined the action and sought to bring their own motions for summary
 17 judgment seeking to relitigate the two bases decided adversely to ATA and AIRCON. *Id.* at *12-
 18 13. But the Court declined to revisit its prior ruling, holding that “United and FedEx are bound
 19 by the Court’s prior decisions in this action” as law of the case, absent a “compelling reason for
 20 reconsideration.” *Id.* at *13-14. The Court reasoned that “principles of issue preclusion”
 21 supported applying law of the case to United and FedEx because both were “members of ATA
 22 and AIRCON,” “chose to join as Plaintiffs in this action,” and “neither United nor FedEx has
 23 argued that its interests were not adequately represented in the earlier proceedings in this case.”
 24 *Id.* The Court also recognized that “[a]lthough the doctrine [of law of the case] typically applies
 25 to decisions involving the same parties, the fact that different parties, or different lawsuits, are
 26 involved is not necessarily determinative.” *Id.* at *16 n.3.

27 Here, too, the law of the case precludes the Parked Claims Plaintiffs from relitigating the
 28 Court’s prior rulings on *Comcast* and *Boedeker 3*, even assuming that the Parked Claims

1 Plaintiffs are “different parties” to this litigation for the purposes of the Court’s prior class
 2 certification rulings. The Parked Claims Plaintiffs have participated in this litigation as class
 3 representatives from the onset, represented by the same counsel as the Selected Claims Plaintiffs,
 4 in pursuit of the same *Comcast*-compliant damages survey. (*See infra* Section V.A.1.) All named
 5 plaintiffs conducted themselves as though Boedeker 2 applied equally to all claims—Boedeker
 6 himself referenced both the Selected Claims and Parked Claims plaintiffs in his report. (ECF
 7 No. 341-3 ¶¶ 22 n.2, 83.) Likewise, all named plaintiffs seek to rely on Boedeker 3, effectively
 8 conceding that Boedeker 2 and Boedeker 3 apply equally regardless of the plaintiff or underlying
 9 cause of action. The identity of interests among the plaintiffs here is therefore much stronger than
 10 it was in *Air Transportation*. *See* 1999 U.S. Dist. LEXIS 8747, at *13-14.

11 Nor can Plaintiffs point to any changed circumstances that would affect the reasoning of
 12 the Court’s latest class certification denial or its exclusion of Boedeker 3. The Parked Claims
 13 Plaintiffs seek to rely on Boedeker 3 for exactly the same purpose as the Selected Claims
 14 Plaintiffs did—to argue that their damages model satisfies the requirements of *Comcast*. Nor can
 15 Plaintiffs argue that Boedeker 3 is “new” or “different” evidence since they have conceded this is
 16 the same report they repeatedly tried to submit in connection with their prior certification motion.
 17 (Ex. H at 26:21-23, 27:5-6.) The Court’s determinations that Boedeker 2 did not satisfy *Comcast*
 18 and that Plaintiffs could not rely on Boedeker 3 to again attempt to correct Plaintiffs’ damages
 19 model are therefore law of the case and preclude re-litigation of those issues in the context of the
 20 Parked Claims.

21 C. Principles of Comity Require Denial of Class Certification of the 22 Parked Claims

23 The Supreme Court has expressly stated that it would “*expect* federal courts to apply
 24 principles of comity” to avoid “serial relitigation of class certification” when addressing a
 25 materially identical dispute. *Smith*, 564 U.S. at 317 (emphasis added). Courts since *Smith*,
 26 including in this District, have rejected successive class certification bids when the reason for
 27 denying class certification in the prior action applied equally to the successive case. *See, e.g.*,
 28 *Williams v. Winco Foods*, No. CV 13-00146 CRB, 2013 U.S. Dist. LEXIS 108928, at *1, 5-6

(N.D. Cal. Aug. 1, 2013) (granting defendant’s motion to deny class certification of materially similar subclasses where plaintiffs could not overcome the same problems that precluded certification of the prior subclasses); *McCabe v. Lifetime Entm’t Servs., LLC*, No. 17-CV-908-ERK-SJB, 2018 U.S. Dist. LEXIS 3212, at *46 (E.D.N.Y. Jan. 4, 2018) (applying comity principles and applying prior court order denying class certification); *Baker v. Home Depot USA, Inc.*, No. 11 C 6768, 2013 U.S. Dist. LEXIS 9377, at *15-16 (N.D. Ill. Jan. 24, 2013) (relying on comity principles to strike class allegations because the “same problems” that barred class certification in prior cases were similarly present); *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1276-78 (W.D. Wash. 2012) (applying comity to deny class certification in a case that was “identical in pertinent part to a putative class action previously pursued by Plaintiffs’ counsel in which plaintiffs asserted the same claims”), *rev’d on other grounds*, 797 F.3d 607 (9th Cir. 2015), *rev’d on other grounds*, 137 S. Ct. 1702 (2017) (leaving the district court’s comity decision intact); *Edwards v. Zenimax Media Inc.*, No. 12-cv-00411-WYD-KLM, 2012 WL 4378219, at *4 (D. Colo. Sept. 25, 2012) (striking class allegations on same grounds).

Courts have routinely recognized that comity principles permit them to reject the same duplicative, wasteful, and burdensome re-litigation tactics that Plaintiffs seek to employ here. *See Smith*, 564 U.S. at 317 (“our legal system generally relies on principles of . . . comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs”); *McCabe*, 2018 U.S. Dist. LEXIS 3212, at *47 (“It is certainly a tremendous waste of judicial resources to have this Court entertain a putative class action identical to a previously rejected class”); *Ott v. Mortg. Inv’rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1063 (D. Or. 2014) (applying principles of comity as a way “to save the resources of the courts and parties” where the parties had expended substantial time and resources); *Microsoft*, 851 F. Supp. 2d at 1278 (comity provides “substantial value” in “discouraging repeated litigation of the same question”) (citation omitted); *Gomez v. St. Vincent Health, Inc.*, No. 1:08-cv-0153-DFH-DML, 2009 U.S. Dist. LEXIS 53946, at *5, 9 (S.D. Ind. June 25, 2009) (plaintiffs’ counsel’s attempt to relitigate class certification showed “a lack of regard for scarce judicial resources” and “burdens a busy district court with duplicative litigation”).

1 Principles of comity therefore permit the Court to reject yet another bid from Plaintiffs to
2 relitigate their repeated failure to submit a damages model that satisfies *Comcast*. Plaintiffs have
3 represented that they intend to rely solely on Boedeker 3 to satisfy *Comcast* for the Parked
4 Claims, and that Boedeker 3 merely fixes “clerical errors” with Boedeker 2. The Court has
5 already denied certification based on Boedeker 2, and repeatedly rejected Plaintiffs’ efforts to rely
6 on Boedeker 3. Moreover, Boedeker 2 expressly addresses both the Selected and Parked Claims
7 Plaintiffs. Plaintiffs thus concede that they will not seek to submit a new model under *Comcast*
8 for the Parked Claims. In short, Plaintiffs’ tactics would result in yet another do-over, severely
9 prejudicing Apple and imposing an extreme and unjustified burden on the Court.

10 VI. CONCLUSION

11 Because Plaintiffs had a full and fair opportunity to litigate the *Comcast* issue under the
12 Parked Claims structure, class certification on the Parked Claims must be denied.

13
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Respectfully submitted,

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16
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20 APPLE INC.